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Banks and Banking-Right to Preference-Special Deposits

BANKS AND BANKING—RIGHT TO PREFERENCE—SPECIAL DEPOSIT—The material facts involved here are simple and may be stated briefly: Plaintiff deposited certain Liberty bonds with receiver's bank and latter gave him a written receipt therefor, and agreed therein that on the surrender of such receipt after sixty days' written notice by either party it would deliver bonds of the same issue and amount and would pay interest semi-annually on the par value of such bonds at the rate of three-quarters of 1 per cent per annum, *in addition* to the rate of interest payable on the bonds. The bank sold the bonds and the proceeds from the bonds were used to augment the assets of the bank. The bank subsequently suspended business. The plaintiff filed his complaint asking that the said bonds or other bonds of the same issue be returned to him, or, in case that was impossible, that he recover the value of such bonds and that his claim be decreed a preferred claim and be paid before the payment of the general claims. The defendant as receiver was ordered to pay plaintiff before paying the general creditors of the bank and from that order the defendant takes this appeal. *Held:* Order below affirmed. That the transaction betwen the plaintiff and the bank was a special deposit and created the relation of bailor and bailee between the parties, and that as a consequence the plaintiff was entitled to a preference over the general creditors. *Stults v. Gordon.* Appellate Court of Indiana, August 28, 1929. 167 N. E. 564.

Clearly the plaintiff is entitled to a preference if there was a mere bailment involved here. The correctness of the court's decision turns upon the proper relationship which grew out of the agreement between the plaintiff and the bank. An analysis of this agreement discloses: first, bonds of the same issue and amount (*but not the identical bonds*) were to be returned to plaintiff on 60 days' notice having been given by either party; second, the bank was to pay interest semi-annually on the par value of such bonds at the rate of three-quarters of 1 per cent *in addition* to the rate of interest payable on the bonds.

Negotiable paper is intended to pass in commerce like money. *Merchant's Loan & Trust Co. v. Lamson*, 90 Ill. App. 18; *Bouvier's Institutes*, vol. 1, p. 458; *Depew v. Rhodes*, 17 Mo. 580; *Moses v. Hancock* (1899), 2 Q. B. D. 3; *Springfield First Nat. Bank v. Skeen*, 101 Mo. 683, 14 S. W. 732, 11 L. R. A. 748; 3 R. C. L. 836. The fact, therefore, that bonds instead of money were deposited here is considered of no material consequence. No distinction shall be made in the cases cited merely because the res there involved was money, whereas here it was bonds.

Our Appellate Court cites but one case, *Tyler County State Bank v. Shivers* (Tex. Civ. App.), 281 S. W. 264, to support its conclusion that there was a bailment involved in the principal case. But in the Texas case one material fact was lacking that is present in this case which seems almost conclusive. Here the bank agreed to pay "three-quarters of 1 per cent interest *in addition* to the rate of interest payable on the bonds." In the Texas case cited in support of the instant decision there was no agreement touching on the question of interest. What was the effect of this agreement to pay interest?

"The obligation to pay interest upon deposited money imports naturally that the money may be used to earn money from which the interest may be paid, which increment from the use of the money would come to the depositor directly had the deposit not been made. Such an arrangement presumptively creates a debt as distinguished from a trust obligation." *Old Colony Trust Co. v. Puritan Motors Corporation*, 244 Mass. 259, 138 N. E. 321, 323 (1923); *Tucker v. Linn* (N. J. Ch.), 57 Atl. 1017 (1904); *Pittsburgh Nat. Bank v. McMurray*, 98 Pa. 538, 40 (1881); *In re Broad, Ex Parte Neck*, 13 Q. B. D. 740 (1884); *In re Gothenburg Commerce Co.*, 29 W. R. 358 (English—opinion by Sir G. Jessel). The instant opinion does not discuss this point in rendering its decision. The writer considers it important to, if not conclusive of, the question involved.

"A 'special deposit' implies the custody of property *without authority in the custodian to use it*, and the right of owner to receive back the *identical* thing deposited." (Our italics.) *Tuckerman v. Mearns*, 262 F. 607, 49 App. D. C. 153; 3 R. C. L. 522. See also, *Bacon v. State Bank of Komiah*, 41 Idaho 518, 240 Pac. 194; *Schulz v. Bank of Harrisonville*, 240 S. W. 614 (Mo. App. 1923). In the first preceding paragraph it was pointed out that payment of interest "imports naturally that the money may be used, etc." But a "special deposit" as defined in *Tuckerman v. Mearns, supra*, precludes such a dealing with the res. The agreement in the principal case did not require the return of *identical* bonds, but only bonds of the "same issue and amount." This latter feature would also take the agreement in the principal case out of the definition of a special deposit as laid down in the *Tuckerman case*. That the identical thing must be returned to constitute a special deposit see: *Spry v. Hirning*, 191 N. W. 833, 46 S. D. 237; *Koetting v. State*, 88 Wis. 502, 60 N. W. 822; *Bank v. Dean*, 9 Okla. 626, 60 Pac. 226; *Association v. Jacobs*, 141 Ill. 261, 31 N. E. 414, 16 L. R. A. 516, 33 Am. St. Rep. 302, 5 Cyc. 199.

To this rule two well-established exceptions may be noted: first, grain stored in public warehouses. *Hall v. Pillsbury*, 43 Minn. 33, 44 N. W. 673, 8 Harv. L. Rev. 432; second, certificates of corporate stock, *Taussig v. Hart*, 58 N. Y. 425. A possible third exception is the case of goods in possession

of a factor. *Norwegian Plow Co. v. Clark*, 102 Iowa 31, 71 N. W. 808. In most jurisdictions, money has not been held to form an exception to the rule stated. *Maine Bank v. Thomas*, 28 Ill. 463; *Davis v. Smith*, 29 Minn. 201, 12 N. W. 531; *In re State Bank*, 56 Minn. 119, 57 N. W. 336; *Rozelle v. Rhodes*, 116 Pa. St. 129, 9 Atl. 160; *Shoemaker v. Hinze*, 53 Wis. 116, 10 N. W. 86.

Even in Texas it has been held that "a special deposit is the placing of something in the custody of the bank of which special restitution must be made . . . to be kept by the bank and *specifically* returned and form no part of the bank's disposable capital." *Tyler County State Bank v. Rhodes*, 256 S. W. 947 (Tex. Civ. App.). Would the Texas Court of Civil Appeals have said in the *Shivers* case, *supra*, that the payment of interest entitled the bank to use the thing deposited as part of the "bank's disposable property?"

It is submitted that, on the facts and reasoning of the cases cited above, the relation between the parties was not that of bailor and bailee. It is suggested that the agreement created the relation of creditor and debtor—that there was a mere loan—a time deposit here. If the plaintiff and the bank became creditor and debtor respectively, it necessarily follows that the plaintiff was not entitled to a preference.

T. R. D.